No. 17-340

IN THE

# Supreme Court of the United States

NEW PRIME, INC.,

*Petitioner,*

v.

DOMINIC OLIVEIRA,

*Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

## BRIEF OF *AMICI CURIAE* HISTORIANS IN SUPPORT OF RESPONDENT


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*Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcommittee of the Senate Committee on the Judiciary*, 67th Cong., 4th Sess. (1923) ..... 10, 22

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Analysis of H.R. 13522 Submitted by President Andrew Furuseth to the Convention Which Was Adopted, in *Proceedings of the Twenty-Sixth Annual Convention of the International Seaman's Union of America* (1923) ..... 22

Bureau of Navigation, *Annual Report of the Commissioner of Navigation to the Secretary of Commerce and Labor* (1909) ..... 18

Colin J. Davis, *Power at Odds: The 1922 National Railroad Shopmen's Strike* (1997) ..... 9

*Commissioner's Power Invaded*, Seaman's Journal. June 23, 1920 ..... 18

Florence E. Parker, *Development and Operation of Pilots' Associations at Representative Ports*, 19 Monthly Lab. Rev. 16 (Nov. 1924) ..... 24

Imre Szalai, *Outsourcing Justice: The Rise of Modern Arbitration Laws in America* (2013) ..... 10

Jon R. Huibregtse, *American Railroad Labor and the Genesis of the New Deal, 1919-1935* (2010) .... 14, 15

Lloyd M. Short, *The Bureau of Navigation: Its History, Activities and Organization* (1923) ..... 19

Margaret Gadsby, *Strike of the Railroad Shopmen*, 15 Monthly Lab. Rev. 1 (Dec. 1922) ..... 9

*Report of the Committee on Commerce, Trade and Commercial Law*, 46 Ann. Rep. A.B.A. 284 (1923) ..... 22

Robert H. Zieger, *Republicans and Labor, 1919-1929* (1969) ..... 14, 15

## INTEREST OF *AMICI CURIAE*[1]

The *amici* are scholars of American labor and legal history, and thus have a professional interest in accurate and valid inferences from the historical record. They are: Shane Hamilton, University of York; Jon Huibregtse, Framingham State University; James Gray Pope, Rutgers Law School; Imre Szalai, Loyola University New Orleans College of Law; Paul Taillon, University of Auckland; and Ahmed White, University of Colorado School of Law. Institutional affiliations are for identification purposes only. We submit this brief to help this Court answer the second question presented in this case.

## SUMMARY OF ARGUMENT

The Federal Arbitration Act ("FAA") exempts from its reach "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. This Court has concluded that Congress enacted this exemption to avoid unsettling dispute-resolution schemes covering some "workers," including the then-established statutory dispute-resolution schemes covering "seamen" and "railroad employees" under the Shipping Commissioners Act of 1872, and Title III of the Transportation Act of 1920, respectively.

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[1] No counsel for a party authored this brief in whole or in part. No person other than *amici curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have provided written consent to the filing of this brief.

Those established schemes did *not* depend on whether a worker would, under the common law of agency, count as an "employee" or an "independent contractor." The Railroad Labor Board repeatedly read its Transportation Act jurisdiction over disputes between railroads and their "employees" to include disputes involving workers who would not have counted as a railroad's "employees" at common law. Shipping commissioner arbitration expressly covered "any question whatsoever" in a seaman's dispute, including those that did not turn on whether the seaman was anyone's "employee" under the common law of agency.

Thus, by operation of the *ejusdem generis* canon, the FAA exemption's residual clause ("any other class of workers") does not cover only common-law employees. If Congress had intended the FAA exemption to cover only common-law employees, as New Prime now reads it, Congress would have disrupted the very statutory dispute-resolution schemes for "seamen" and "railroad employees" that it had wanted to avoid unsettling.

## ARGUMENT

### I. The Transportation Act Covered Railroad Workers Who Would Not Have Counted as Employees Under the Common Law of Agency

This Court has declared "that Congress excluded 'seamen' and 'railroad employees' from the FAA for the simple reason that it did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers." *Circuit*

*City Stores v. Adams*, 532 U.S. 105, 121 (2001). Thus, when Congress enacted the FAA in 1925, it intended the FAA exemption to ensure that the FAA did not disrupt the settled scope of the "grievance procedures" that then existed for railroad workers under federal law, namely Title III of the Transportation Act, 1920, ch. 91, §§ 300–316, 41 Stat. 456, 469-74. *Circuit City*, 532 U.S. at 121.

Under that Act, the Railroad Labor Board repeatedly read its authority to decide disputes between railroads and their "employees" to include workers who, under the common law of agency, might have been classified as "independent contractors" or otherwise not counted as the railroad's "employees." Accordingly, by operation of the *ejusdem generis* canon, the FAA exemption's residual clause cannot be limited in scope only to common-law employees. If not, the FAA would have disrupted the Transportation Act's dispute-resolution scheme.

### A. Railroad "Employees" Under the Transportation Act Included Workers Who Were Not Common-Law Employees of the Railroad

Enacted in 1920, the Transportation Act's Title III imposed "the duty of all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof." § 301, 41 Stat. at 469. If railroads and workers could not resolve their disputes themselves by conference or by

a board of adjustment, the Act authorized a nine-member Railroad Labor Board to hear and decide those disputes. *See* §§ 304-307, 41 Stat. at 469-70.

Under this scheme, the Act's coverage and the Railroad Labor Board's jurisdiction often depended on whether the workers in a labor dispute counted as the railroad's "employees" under the Act. The duty under section 301 of the Act covered only disputes "between the carrier and the employees or subordinate officials thereof." § 301, 41 Stat. at 469. Similarly, the Railroad Labor Board had jurisdiction over disputes involving "grievances, rules, or working conditions . . . between the carrier and its employees or subordinate officials," § 303, 41 Stat. at 470, *see* § 307(a), 41 Stat. at 471, or "disputes with respect to the wages or salaries of employees or subordinate officials of carriers," § 307(b), 41 Stat. at 471.

In turn, the Railroad Labor Board read its jurisdiction over disputes between railroads and their "employees" to include disputes involving workers who would not have counted as the railroad's employees under the common law of agency. In *Railway Employees' Dep't, A.F. of L v. Indiana Harbor Belt Railroad Co.*, No. 982, 3 R.L.B. 332 (1922) ("Decision No. 982"), the railroad had argued that because the shop employees were nominally employed by a third-party contractor, not the railroad, the Transportation Act did not apply. *See id.* at 336. The Board disagreed:

> When Congress in this act speaks of railroad employees it undoubtedly contemplates those engaged in the customary work directly contributory to

> the operation of the railroads. It is absurd to say that carriers and their employees would not be permitted to interrupt commerce by labor controversies unless the operation of the roads was turned over to contractors, in which event the so-called contractors and the railway workers might engage in industrial warfare ad libitum. . . . A strike by the employees of a contractor or contractor-agent of a carrier would as effectually result in an interruption to traffic as if the men were the direct employees of the carrier.

*Id.* at 337-38.

In subsequent similar cases, the Board applied or extended Decision No. 982 to declare that the workers in those cases, though nominally working for a third-party contractor, counted as the railroad's "employees" under the Act. See *United Bhd. of Maint. of Way Employees & Ry. Shop Laborers v. Chicago Great W. R.R. Co.*, No. 1075, 3 R.L.B. 539, 539-40 (1922); *Ry. Employees' Dep't, A.F. of L. v. Chicago Great W. R.R. Co.*, No. 1076, 3 R.L.B. 540, 542 (1922); *Ry. Employees' Dep't, A. F. of L. v. St. Louis, Brownsville & Mexico Ry. Co.*, No. 1078, 3 R.L.B. 544, 545 (1922); *United Bhd. of Maint. of Way Employees and Ry. Shop Laborers v. Indiana Harbor Belt R.R. Co.*, No. 1079, 3 R.L.B. 545, 547 (1922); *Ry. Employees' Dep't, A. F. of L. v. Missouri, Kansas & Texas Ry. Co.*, No. 1080, 3 R.L.B. 548, 551 (1922); *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees v. Cleveland, Cincinnati, Chicago & St.*

*Louis Ry. Co.*, No. 1119, 3 R.L.B. 594, 596 (1922); *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees v. New York Cent. R.R. Co.*, No. 1209, 3 R.L.B. 665, 666 (1922); *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees v. Erie R.R. Co.*, No. 1210, 3 R.L.B. 667, 668 (1922); *United Bhd. of Maint. of Way Employees & Ry. Shop Laborers v. San Antonio, Uvalde & Gulf R.R.*, No. 1212, 3 R.L.B. 670, 673 (1922); *Ry. Employees' Dep't, A. F. of L. v. Erie R.R. Co.*, No. 1214, 3 R.L.B. 675, 677 (1922); *Ry. Employees' Dep't, A. F. of L. v. New York Cent. R.R. Co.*, No. 1216, 3 R.L.B. 679, 681-82 (1922); *Am. Fed'n of R.R. Workers v. New York Cent. R.R. Co.*, No. 1217, 3 R.L.B. 682, 683 (1922); *United Bhd. of Maint. of Way Employees & Ry. Shop Laborers v. Erie R.R. Co.*, No. 1218, 3 R.L.B. 683, 685 (1922); *Am. Fed'n of R.R. Workers v. Erie R.R. Co.*, No. 1219, 3 R.L.B. 686, 686-87 (1922); *Am. Fed'n of R.R. Workers v. New York Cent. R.R. Co.*, No. 1220, 3 R.L.B. 687, 688 (1922); *Bhd. of Locomotive Eng'rs v. Cincinnati, Indianapolis & W. R.R. Co.*, No. 1224, 3 R.L.B. 690, 692 (1922); *United Bhd. of Maint. of Way Employees & Ry. Shop Laborers v. St. Louis-San Francisco Ry. Co.*, No. 1231, 3 R.L.B. 702, 704-705 (1922); *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees v. New York Cent. R.R. Co.*, No. 1232, 3 R.L.B. 705, 706-07 (1922); *Ry. Employees' Dep't, A. F. of L. v. Indiana Harbor Belt R.R. Co.*, No. 1235, 3 R.L.B. 709, 710 (1922); *Ry. Employees' Dep't, A. F. of L. v. Erie R.R. Co.*, No. 1241, 3 R.L.B. 727, 727 (1922); *United Bhd. of Maint. of Way Employees & Ry. Shop Laborers v. Chicago & Alton R.R. Co.*, No. 1254, 3 R.L.B. 741, 744 (1922); *Ry. Employees' Dep't, A. F. of L. v. Michigan Cent. R.R. Co.*, No. 1255, 3 R.L.B. 745, 746-47 (1922); *United*

*Bhd. of Maint. of Way Employees & Ry. Shop Laborers v. Chicago, Rock Island & Pacific Ry. Co.*, No. 1256, 3 R.L.B. 747, 750 (1922); *Ry. Employees' Dep't, A. F. of L. v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.*, No. 1259, 3 R.L.B. 752, 753-54 (1922); *Ry. Employees' Dep't, A. F. of L. v. Pere Marquette Ry. Co.*, No. 1260, 3 R.L.B. 754, 756 (1922); *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees v. Cincinnati, Indianapolis & W. R.R. Co.*, No. 1262, 3 R.L.B. 757, 758 (1922); *Ry. Employees' Dep't, A. F. of L. v. Cincinnati, Indianapolis & W. R.R. Co.*, No. 1263, 3 R.L.B. 758, 761-62 (1922); *United Bhd. of Maint. of Way Employees & Ry. Shop Laborers v. Missouri-Kansas-Texas Lines*, No. 2207, 5 R.L.B. 213, 214 (1924); *see also United Bhd. of Maint. of Way Employees & Ry. Shop Laborers v. Chicago, Milwaukee & St. Paul Ry. Co.*, No. 1222, 3 R.L.B. 689, 690 (1922) (relying on previous Board decisions on "the general question of contracting work"); *Ry. Employees' Dep't, A. F. of L., v. Chicago Great W. R.R. Co.*, No. 1225, 3 R.L.B. 692, 695 (1922)("recent decisions" in "the contract question was involved with this carrier"); *United Bhd. of Maint. of Way Employees & Ry. Shop Laborers v. Chicago Great W. R.R. Co.*, No. 1226, 3 R.L.B. 696, 697 (1922) ("board's position on the general question of contracts"); *Ry. Employees' Dep't, A.F. of L. v. Bangor & Aroostook R.R.*, No. 1257, 3 R.L.B. 750, 751-52 (1922) (same). For similar decisions, see *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees v. Chicago Great W. R.R. Co.*, No. 1077, 3 R.L.B. 542 (1922); and *United Bhd. of Maint. of Way Employees & Ry. Shop Laborers v. Chicago & N. W. Ry. Co.*, No. 1215, 3 R.L.B. 678 (1922).

Indeed, the Board even extended Decision No. 982 to cases in which the railroad had contracted out its workers to third-party contractors, and then those workers had left the contractor to go on strike. *See Ry. Employees' Dep't, A. F. of L., v. W. Maryland Ry. Co.*, No. 1361, 3 R.L.B. 934, 938-939 (1922); *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees v. Delaware, Lackawanna & W. R.R. Co.*, No. 3905, 6 R.L.B. 1248, 1249-50 (1925).

More importantly, the Board applied Decision No. 982 to a case where the railroad contracted *directly* with individual workers who, it later argued, were non-employee contractors, and thus outside the Board's jurisdiction. *United Bhd. of Maint. of Way Employees & Ry. Shop Laborers v. St. Louis-San Francisco Ry. Co.*, No. 1230, 3 R.L.B. 700 (1922). There, the railroad took bids from individuals for contracts to work as "pumpers," *i.e.*, to operate the railroad's water-pumping stations. *See id.* at 700. After bidding, the railroad awarded some contracts to some of its nominal employees then already working as pumpers, and other contracts to "outsiders" who thereby "displaced" other nominal railroad employees. *Id.* Later, the railroad defended this practice, noting that it had handled these contracts "'on the same basis as all other contract work. . . . Any employee of the company had the privilege under public notice to enter his bid covering the operation of pumping plant on the same basis as a nonemployee.'" *Id.* at 702.

The Railroad Labor Board disagreed: Decision No. 982's "principle with respect to contracting as well as the apparent nonconformity with the purpose and intent of the transportation act and decisions of the

Labor Board is much more pronounced in the so-called individual contracts than in the contracts with firms and corporations." *Id.* Thus, "the so-called 'individual contracts' between the individual employees" and the railroad violated the Transportation Act insofar as the railroad took those contracts to "remove said employees from the application of" the Act. *Id.* Those workers, though nominally independent contractors, still counted as the railroad's "employees" under the Transportation Act.

These Board decisions cannot have escaped Congress's notice, because the railroads' contracting-out practices was one of the main reasons for the national railroad shopmen's strike of 1922. *See* Colin J. Davis, *Power at Odds: The 1922 National Railroad Shopmen's Strike* 57-59 (1997); Margaret Gadsby, *Strike of the Railroad Shopmen*, 15 Monthly Lab. Rev. 1, 16 (Dec. 1922). In that strike (July – October 1922), over 250,000 shopmen walked off the job. *See* Davis, *supra* at 67-68. Violent clashes followed, *see id.* at 83-100, as did railroad service interruptions that led to serious shortages in grain, coal, and steel, among other costs to the national economy, *see id.* at 163.

A few months after the strike ended, the FAA's reference to "railroad employees" appeared as part of proposed changes to FAA bills introduced into the 67th Congress in December 1922, *see* 64 Cong. Rec. 797 (1922) (H.R. 13522); 64 Cong. Rec. 732 (1922) (S. 4214). By letter, dated January 31, 1923, Commerce Secretary Herbert Hoover, who months earlier had met with railroad executives and their financiers to resolve the shopmen's strike, *see* Davis, *supra* at 107—09, wrote to the Senate Judiciary subcommittee then

holding hearings on the Senate bill (S. 4214) to express support and suggest an amendment: "If objection appears to the inclusion of workers' contracts in the law's scheme, it might be well amended by stating 'but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce.'" *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong., 4th Sess. 14 (1923) (hereinafter "Hearing on S. 4213") (reprinting letter).[2]

Although these FAA bills died in committee, new versions of them, now with Hoover's proposed "workers' contracts" exemption, were filed in the 68th Congress, and Hoover endorsed those bills. *See*

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[2] In that hearing, South Dakota Senator Sterling referred to a letter "from a constituent of mine, Mr. C.O. Bailey, a lawyer at Sioux Falls." *Hearing on S. 4213*, *supra* at 9. Bailey was a prominent South Dakota lawyer and his firm, Bailey & Voorhees, had some large railroads as clients. *See* Imre Szalai, *Outsourcing Justice: The Rise of Modern Arbitration Laws in America* 133 (2013). Before the hearing, Senator Sterling had sent Bailey's letter to Charles Bernheimer, President of the New York State Chamber of Commerce's Arbitration Committee and the principal booster of the FAA. *Id.* In turn, Bernheimer asked Chamber counsel Julius Cohen to respond to Bailey's concerns, which included how the proposed FAA would apply to workers engaged in interstate commerce. *Id.* at 133-34. Following Bailey's suggestion, Cohen proposed an FAA exemption identical to Hoover's proposed "workers' contracts" exemption, which Bernheimer then forwarded to Senator Sterling. *Id.* at 135. Bernheimer later suggested that he had solicited or encouraged Hoover's letter to the Senate subcommittee. *See id.* at 145.

*Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomm. of the Comm. on the Judiciary*, 68th Cong., 1st Sess. 20 (1924).

New Prime argues that, under the *ejusdem generis* canon, the scope of the FAA exemption's residual clause ("any other class of workers") should be similar to the scope of the FAA's "railroad employees" exemption. *See* Pet. Br. at 26-27. Congress, however, cannot have intended the "railroad employees" exemption to be limited to common-law employees, because the Railroad Labor Board repeatedly refused to limit the Transportation Act to common-law employees of railroads. Therefore, by *ejusdem generis* alone, the FAA exemption's residual clause should not be limited to common-law employees.

### B. The FAA Would Have Disrupted the Transportation Act Had It Only Exempted Common-Law Employees

Had the FAA's "railroad employees" exemption covered *only* railroad workers who counted as employees under the common law of agency, as New Prime argues, *see* Pet. Br. at 25-26, the FAA would have disrupted the Transportation Act's dispute-resolution scheme.

To illustrate, suppose the workers' contracts to work as pumpers in *United Bhd. of Maint. of Way Employees & Ry. Shop Laborers v. St. Louis-San Francisco Ry. Co.*, No. 1230, 3 R.L.B. 700 (1922), included pre-dispute arbitration clauses. If so, under New Prime's reading, the railroad could have used the

FAA, 9 U.S.C. § 4, to have a court compel arbitration of those workers' disputes *outside* the Transportation Act's statutory dispute-resolution scheme, because the common law of agency would treat those workers as "independent contractors." At the same time, the Railroad Labor Board could still decide those disputes, because those workers were the railroad's "employees" under the Transportation Act, and because the Board did not need both parties' assent to assert its jurisdiction, *see* § 307(a)(1)-(3), (b)(1)-(3), 41 Stat. at 470-71.

Thus, the same dispute could lead to both an arbitral award and a Railroad Labor Board decision. The problem: the FAA made the arbitral award judicially enforceable, 9 U.S.C. § 9, while a Railroad Labor Board decision was *not* judicially enforceable under the Transportation Act, *see Pennsylvania R. Co. v. U.S. R.R. Labor Bd.*, 261 U.S. 72, 79 (1923), nor subject to judicial review on the "correctness" of the Board's conclusions, *id.* at 85.

Accordingly, if the arbitrator and the Railroad Labor Board disagreed, the FAA, by making the arbitrator's award judicially-enforceable, would in effect let the arbitral award supplant the (judicially-unenforceable) Board's decision. This would have unsettled Title III of the Transportation Act, because Congress predicated that scheme on using the force of public opinion *alone* to motivate compliance with Board decisions. *See id.* at 79-80 (Board decision's "only sanction" is "the force of public opinion invoked by the fairness of a full hearing, the intrinsic justice of the conclusion, strengthened by the official prestige of the Board, and the full publication of the violation of

such decision by any party to the proceeding. . . . The function of the Labor Board is to direct . . . public criticism against the party who, it thinks, justly deserves it."); *id.* at 84 ("It was to reach a fair compromise between the parties without regard to the legal rights upon which each side might insist in a court of law. . . . Under the act there is no constraint upon them to do what the Board decides they should do except the moral constraint . . . of publication of its decision.").

### C. Neither the Federal Employers' Liability Act nor the Railway Labor Act Matter Here

Although New Prime relies on the Federal Employers' Liability Act of 1908, *see* Act of April 22, 1908, ch. 149, 35 Stat. 65 ("FELA"), and the Railway Labor Act of 1926, ch. 347, 44 Stat. 577, *see* Pet. Br. at 25-26, neither supports reading the FAA's exemption to cover only common-law employees.

First, Congress did not refer to "railroad employees" in the FAA to avoid unsettling a statutory dispute-resolution scheme for potential FELA plaintiffs (injured railroad workers), because there was *no* such scheme. Rather, Congress expected FELA plaintiffs to proceed to court like anyone else with a similar federal statutory cause of action. Besides, in Decision No. 982, the Railroad Labor Board had rejected FELA cases as not "in point" in deciding the scope of the Board's jurisdiction under Title III of the Transportation Act, because those statutes had different purposes. *Ry. Employees' Dep't, AFL*, 3 R.L.B. at 338.

Second, the Railway Labor Act of 1926 does not matter. The 69th Congress enacted it in May 1926, well *after* the 68th Congress had enacted the FAA in February 1925. In invoking the Railway Labor Act nonetheless, New Prime and its *amici* seem to assume that, over a year *before* the 69th Congress moved from one statutory dispute-resolution scheme for railroad workers (Title III of the Transportation Act) to the other (the Railway Labor Act), the 68th Congress had treated that change as inevitable and had wanted the scope of the FAA exemption's residual clause to *vary accordingly*.

That is not how *ejusdem generis* works where, as here, Congress enacted the FAA exemption's residual clause and its more specific terms ("seamen" and "railroad employees") at the same time in the same Act. *See, e.g., Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624-25 (2018) (applying *ejusdem generis* to read National Labor Relations Act § 7's catchall clause not to cover class or collective actions immediately after describing "procedures like" class or collective actions as "hardly known when" Congress enacted that Act in 1935).

Moreover, when the 68th Congress enacted the FAA in February 1925, the Railway Labor Act's passage was not inevitable. The Howell-Barkley bill, introduced a year earlier, had already failed to pass, largely because of strong opposition from railroad executives, the Coolidge administration, and House Republicans. *See* Jon R. Huibregtse, *American Railroad Labor and the Genesis of the New Deal, 1919-1935*, at 54-56 (2010); Robert H. Zieger, *Republicans and Labor, 1919-1929*, at 198-202 (1969). Carrier-

union negotiations to replace the Transportation Act were stalled and would remain so until shortly after March 1925, when this Court confirmed again that Railroad Labor Board decisions were not judicially enforceable, *see Pennsylvania R.R. Sys. & Allied Lines Fed'n No. 90 v. Pennsylvania R.R. Co.*, 267 U.S. 203, 215-16 (1925), and there arose the prospect of a strike by unions who were resisting a judge's order to comply with Board subpoenas, *see Railroad Labor Bd. v. Robertson*, 3 F.2d 488 (N.D. Ill. 1925), *rev'd* 268 U.S. 619 (1925). *See* Huibregtse, *supra*, at 70-72. When finally introduced, almost a year later, the bill that became the Railway Labor Act, *see* H.R. 9463, 69th Cong. (Feb. 1926), though ultimately successful, faced serious opposition in Congress, *see* Zieger, *supra*, at 207-10. Thus, although this Court described the Railway Labor Act's passage as then "imminent", *Circuit City*, 532 U.S. at 121, the 68th Congress never had such hindsight.

Perhaps New Prime and its *amici* are really arguing that the 69th Congress had wanted some part of the Railway Labor Act *itself* (such as how it defined "employee"[3]) to fundamentally narrow the 68th Congress's intended scope of the FAA exemption. That inference is "more than a little doubtful," because of the "usual rule that Congress does not alter the fundamental details of a regulatory scheme in vague

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[3] § 1(Fifth), 44 Stat. at 577; and *In re Regulations Concerning the Class of Employees and Subordinate Officials That Are to be Included with the Term "Employee" under the Railway Act*, 136 I.C.C. 321 (1928) (employees of railroads who belong to and exclusively operate unincorporated voluntary association of railroad carriers are also "employees" of that association).

terms or ancillary provisions." *Epic Sys. Corp.*, 138 S. Ct. at 1626-27 (citation and internal quotation marks omitted). The Railway Labor Act of 1926 does not mention the FAA at all, *see* ch. 347, 44 Stat. 577, and neither does its legislative history, *see* S. Comm. on Labor and Public Welfare, 93d Cong., *Legislative History of the Railway Labor Act, As Amended (1926 Through 1966)* 18-720 (1974).

## II. Shipping Commissioner Arbitration Covered Seamen's Disputes That Did Not Turn on Whether Those Seamen Were Common-Law Employees

Congress excluded "contracts of employment of seamen" from the FAA to avoid unsettling the then-established statutory dispute-resolution scheme for seamen's disputes under the Shipping Commissioners Act of 1872, ch. 322, §§ 25-26, 17 Stat. 262, 267, codified as amended, 46 U.S.C. §§ 651-652 (1925).[4] See *Circuit City*, 532 U.S. at 121 (citing this scheme). That scheme covered "any question whatsoever between a master, consignee, agent or owner, and any of his crew." 46 U.S.C. § 651 (1925). Such disputes mostly did *not* turn on whether the "crew" member (the seaman) was an "employee" under the common law of agency. If the FAA's "seamen" exemption had covered only common-law employees, the FAA would have

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[4] In 1979, Congress ended the use of shipping commissioners: "[N]one of these funds appropriated in this or any other Act shall be available for pay or administrative expenses in connection with shipping commissioners in the United States." Department of Transportation and Related Agencies Appropriation Act, 1980, Pub. L. No. 96-131, 93 Stat. 1023, 1024 (1979).

disrupted that scheme. Accordingly, the FAA exemption should not be read to cover only common-law employees.

### A. Shipping Commissioner Arbitration Covered Any Question in a Seaman's Dispute

In the Shipping Commissioners Act of 1872, to further protect "seamen in respect to their treatment and wages," *Inter-Island Steam Nav. Co. v. Byrne*, 239 U.S. 459, 462 (1915), Congress authorized the appointment of "shipping commissioners" for each port of entry to oversee and enforce certain statutory requirements concerning the engagement, discharge, and wages of seamen. *See* §§ 12-24, 17 Stat. at 264-67. Shipping commissioner duties included enforcing the requirement, in place since 1790, that a vessel master make written agreements ("shipping articles") with every seaman on board that vessel that followed a prescribed form and set forth certain terms, *see* Act of July 20, 1790, ch. 29, 1 Stat. 131, codified as amended, 46 U.S.C. § 564 (1925), unless the master was otherwise exempted from doing so, *see, e.g.*, *id.* § 566 (exempting "masters of coastwise [and] lake-going vessels that touch at foreign ports").

More importantly, the Shipping Commissioners Act also authorized shipping commissioners to "hear and decide any question whatsoever between a master, consignee, agent or owner, and any of his crew, which both parties agree in writing to submit to him." § 25, 17 Stat. at 267. In this scheme, the shipping commissioner's award bound "both parties, and shall, in any legal proceedings which may be

taken in the matter, before any court of justice, be deemed to be conclusive as to the rights of parties." *Id.* And in any such "proceeding relating to the wages, claims, or discharge of a seaman," the shipping commissioner could "call upon the owner, or his agent, or upon the master, or any mate, or any other member of the crew" to produce themselves or any documents they had for examination. § 26, 17 Stat. at 267.[5]

These sections of the Act were later touted as "among the most useful of those relating to seamen, and they doubtless prevent considerable litigation and waste of time and money by all concerned." Bureau of Navigation, *Annual Report of the Commissioner of Navigation to the Secretary of Commerce and Labor* 69 (1909); *see also Commissioner's Power Invaded*, Seaman's Journal, June 23, 1920, at 8 (excerpt of letter from agent of Eastern and Gulf Sailors' Association) ("seamen have been generally satisfied to assent to the Shipping Commissioner's rulings, because the great majority of minor disputes involving questions of overtime and fines, when not settled at the pay table on board the ship, never advanced further than the Commissioner's office, where a Union representative could always be present to intervene in behalf of the dissatisfied seaman").

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[5] Congress later provided that the Shipping Commissioners Act of 1872 did not apply to, *inter alia*, certain "sail or steam vessels engaged in coastwide trade" as well as "any case where the seamen are by custom or agreement entitled to participate in the profits or result of a cruise, or voyage." Act of June 9, 1874, ch. 260, 18 Stat. 64, 64-65.

Thereafter, while Congress added to seamen's legal protections, *see, e.g.*, Act of March 4, 1915, ch. 153, 38 Stat. 1164; Merchant Marine Act, 1920, ch. 250, § 33, 41 Stat. 988, 1007 ("Jones Act"), and changed how shipping commissioners were appointed, supervised, and paid, *see generally* Lloyd M. Short, *The Bureau of Navigation: Its History, Activities and Organization* 85-88 (1923), the scope of shipping-commissioner arbitration remained unchanged: "any question whatsoever," so long as the disputed question was "between a master, consignee, agent or owner, and any of his crew," and "both parties" agreed "in writing" to submit that issue to the shipping commissioner, 46 U.S.C. § 651 (1925).

In denoting the parties to such arbitration, *see id.* ("master, consignee, agent or owner, and any of his crew"); *id.* § 652 ("seaman"), Congress used maritime terms of art with well-settled meanings, such as "seaman", *see id.* § 713 ("In the construction of this chapter, . . . every person (apprentices excluded) who shall be employed or engaged to serve *in any capacity* on board the [vessel] shall be deemed and taken to be a 'seaman'.") (emphasis added); *see also McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 346 (1991) ("settled" maritime law by 1920 that "seaman" need only be a person "employed on board a vessel in furtherance of its purpose").

Similarly, it was well settled that a vessel's "crew" typically covered its seamen and inferior officers, unless the statute excluded those officers "by enumerating them, as contradistinguished from the rest of the crew." *United States v. Winn*, 28 F. Cas. 733, 735 (C.C.D. Mass. 1838) (Story, J.); *accord The*

*Marie*, 49 F. 286, 287 (D. Or. 1892); *see also The Buena Ventura*, 243 F. 797, 798-99 (S.D.N.Y. 1916) ("wireless operator" was part of vessel's "crew" despite coming on board "in pursuance of a contract between [vessel] owners and the Marconi Wireless Telegraph Company of America"); *The Manchioneal*, 243 F. 801, 805 & n.1 (2d Cir. 1917) (same); *The Bound Brook*, 146 F. 160, 164 (D. Mass. 1906) (a vessel's "crew" "naturally and primarily" refers to persons "on board her aiding in her navigation, without reference to the nature of the arrangement under which they are on board").

Indeed, if a vessel's master had to follow the shipping-article requirements for a seaman, that seaman was necessarily part of the "crew", because a master was only so obliged for "every seaman whom he carries to sea *as one of the crew*." 46 U.S.C. § 564 (1925) (emphasis added); *see also id.* § 563 (authorizing shipping commissioners to "ship crews" for vessels engaged in certain kinds of trade, provided "an agreement shall be made with each seaman engaged *as one of such crew*" that satisfies certain requirements) (emphasis added).

### B. The FAA Would Have Disrupted Shipping Commissioner Arbitration Had It Only Exempted Seamen Who Were Common-Law Employees

New Prime errs by reading "contracts of employment of seamen" in the FAA to cover only "seamen" who are *also* "employees" under the common law of agency. *See* Pet. Br. at 26 (citing the Jones Act). This reading would have disrupted how Congress had calibrated shipping-commissioner arbitration. Unlike

the FAA, a shipping commissioner's arbitral authority triggered only if "both parties agree in writing to submit [the disputed question] to him," 46 U.S.C. § 651 (1925), *i.e.*, *after* the dispute arose, *see The W.F. Babcock*, 85 F. 978, 982-93 (2d Cir. 1898); *The Howick Hall*, 10 F.2d 162, 163 (E.D. La. 1925); *The Donna Lane*, 299 F. 977, 982 (W.D. Wash. 1924).

This is partly why, in January 1923, International Seamen's Union of America President Andrew Furuseth objected to the FAA (then proposed without any workers exemption). His worry: Shipowners would add *pre*-dispute arbitration clauses when engaging a seaman and then, when a dispute arose, they would use the FAA to *compel* that seaman to submit that dispute to shipping-commissioner arbitration, even though that seaman, if choosing *post*-dispute, would have rather gone to court:

> With reference to the seaman it will be an easy matter. Place in the contract to labor—the shipping articles—any rider not specifically prohibited by law, and the articles are loaded down with such already, and then at the end of the articles a rider already rather usual, that any disagreement shall be arbitrated by the Shipping Commissioner (under existing statutes this includes consuls), and the seaman's right to wages, to food, to damages under the Jones Act, together with his present right to quit work in harbor, becomes void. With the seaman the machinery is there and ready. The shipowner only needs this bill

> to become law and slavery is restored without any other noise, except such as the victim may make.

Analysis of H.R. 13522 Submitted by President Andrew Furuseth to the Convention Which Was Adopted, in *Proceedings of the Twenty-Sixth Annual Convention of the International Seamen's Union of America* 204 (1923).[6]

New Prime's reading would have disrupted shipping commissioner arbitration in this way for *most* of the disputes it covered. Jones Act aside, those disputes mostly did *not* turn on whether that seaman was an "employee" under the common law of agency. *See, e.g.*, 46 U.S.C. § 594 (1925) (seaman who "signed an agreement and is afterwards discharged before the commencement of the voyage . . . without fault on his part justifying the discharge" is entitled to one month's wages "as if it were wages duly earned"); *id.* § 578 (seaman "shipped" contrary to "any act of Congress" may "leave the service at any time, and shall be entitled to recover the highest rate of wages of the port from which the seaman was shipped, or the sum agreed to be given him at his shipment"); *Whitney*

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[6] FAA drafters referred to Furuseth's opposition when suggesting what became the FAA's workers exemption. *See Report of the Committee on Commerce, Trade and Commercial Law*, 46 Ann. Rep. A.B.A. 284, 287 (1923); *Hearing on S. 4213*, *supra* at 9. Although this Court gave no weight to Furuseth's general opposition to *any* employment arbitration, *see Circuit City*, 532 U.S. at 119-20, his comment here simply illustrates *how* the FAA could have affected shipping-commissioner arbitration, and thus why Congress had reason to exempt seamen from the FAA, *see id.* at 121.

*v. Tibbol*, 93 F. 686, 687-88 (9th Cir. 1899) (seamen had enforceable wage lien on freight owed to shipowner). Indeed, by 1925, of all the provisions set forth in chapter 18, title 46, of the U.S. Code (titled "Merchant Seamen"), *see* 46 U.S.C. §§ 541-713 (1925), just *one*—the Jones Act—used the term "employee," *see id.* § 688.

Thus, if the FAA had exempted only seamen who were also common-law employees, as New Prime argues, the FAA would have largely undermined Congress's decision to predicate shipping commissioner arbitration on the *post-dispute* assent of both parties. And absent such assent, that scheme's coverage would have turned on a question—whether the seaman was an "employee" under the common law of agency—that otherwise did not matter for most seaman disputes under federal law.

Indeed, even for seaman disputes arising under *State* law, New Prime's reading of the FAA would have similarly disrupted shipping commissioner arbitration. To illustrate, consider disputes over fees for maritime pilots. Maritime pilots are "trained and skilful [sic] seamen" hired to navigate vessels into and out of ports, or along rivers, harbors, and similar waterways, *The China*, 74 U.S. 53, 67 (1868), and thus were treated as part of a vessel's crew, *see, e.g.*, 46 U.S.C. § 221 (1925) (requiring "all the officers of vessels of the United States who shall have charge of a watch, including pilots" to be U.S. citizens). By the time of the FAA, Congress had long let States regulate the employment and licensing of some maritime pilots. *See* 46 U.S.C. §§ 211-215 (1925); *see also Cooley*

*v. Board of Wardens*, 53 U.S. 299, 317 (1852) (discussing antecedent 1789 federal statute).

In turn, some States required vessel masters or owners to hire a duly licensed pilot to navigate certain waterways within the State's boundaries, *see, e.g.*, *China*, 74 U.S. at 60-61 (discussing 1857 New York law), and set the fees for such piloting services, *see generally* Florence E. Parker, *Development and Operation of Pilots' Associations at Representative Ports*, 19 Monthly Lab. Rev. 16, 22-34 (1924) (surveying pilot fees at various ports).

This matters here, because under such State laws, a vessel's master, owner, and consignee were usually liable for those pilot fees.[7] Indeed, pilots could

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[7] *See, e.g.*, Ala. Code § 2506 (1923) ("The master, owner or consignee of any ship or vessel must pay the pilot who conducts a vessel into or out of the bay or harbor of Mobile . . . ."); Calif. Political Code § 2488 (Deering 1924) (master, owner, or consignee of vessel liable for both pilot's "regular fees" and additional amount for pilot's "extra service for the preservation of such vessel while in distress"); Ga. Code Ann. § 1905 (Park 1914) ("all fees for pilotage may be demanded and recovered . . . from the owner, master, or consignee of the vessel"); N.J. Comp. Stat. vol. 3, § 32, at 3955-56 (1911) (pilotage "payable by the master, owner, agent, or consignee entering or clearing the vessel . . . who shall be jointly and severally liable therefor"); Or. Laws § 7730 (1920) ("master, owner, and consignee or agent are jointly and severally liable to" pilot for "any sum due him for piloting or offering to pilot" vessel); Digest of Pa. Stat. Law 1920 § 21704 (West 1921) (where inbound ship or vessel prevented from proceeding to port of Philadelphia, "pilot shall be entitled to receive and recover from the owner or consignee of such ship or vessel full pilotage" plus additional amount); S.C. Code of Laws

(*Footnote continued*)

bring admiralty actions in federal court to recover fees owed under such State laws. *See Reardon v. Ankell*, 59 F. 624 (S.D.N.Y. 1894). Liability under such State laws did not turn on whether the pilot had been anyone's "employee" under that State's common-law of agency. Under New Prime's view, however, although Congress exempted "seamen" from the FAA, it still wanted to let shipowners disrupt shipping commissioner arbitration by using the FAA to compel pilots to arbitrate their fee disputes arising under such State laws, depending on whether those pilots would have been "employees" or not under that State's common law of agency. That seems unlikely.

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tit. 11, ch. 28, § 21 (1922) ("Any pilot boarding a vessel on pilot ground shall be entitled to receive from the master, owner, or consignee, four dollars for every day of his being on board previous to her coming into port, in addition to the fees of pilotage"); Tex. Rev. Civil. Stat. art. 8255, 8256 (1925) (pilotage liability of vessel and consignee); Va. Code § 3635 (1924) (master and owner of "every vessel" liable to pilot for "his pilotage and other allowances, and also the consignee or supercargo of any vessel not owned by a citizen of the State"); Wash. Comp. Stat. Ann. § 9872 (Remington 1922) (pilotage on Puget Sound); *id.* §§ 9877, 9887 (pilotage on Columbia River).

## CONCLUSION

This Court should decide the second question presented in the respondent's favor.

Respectfully submitted,

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